Suhaimi bin Ibrahim & Ors v Hi-Summit Construction Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-452–02 OF 2013
MOHAMAD ARIF, MAH WENG KWAI AND DAVID WONG JJCA
26 DECEMBER 2014

Companies and Corporations — Derivative action — Minority shareholder — Application under s 181A of the Companies Act 1965 for leave to maintain suit filed by company to recover RM323m equity in another company — Application made out of fear majority shareholder might discontinue suit and cause irreparable loss to company — High Court refused leave on finding minority shareholders controlled company and therefore were not 'genuinely aggrieved minority' — Whether appellate court should grant the s 181A leave as company had not itself made any resolution regarding suit — Whether minority shareholders could file fresh s 181A application if majority shareholder decided to discontinue suit

The first respondent ('Hi-Summit'), which was controlled by the appellants, had commenced a suit in the High Court ('the D3 Suit') to recover its 19% equity, worth RM323m, in the third respondent company ('KLT'). The suit was premised on the allegation the said equity had been fraudulently transferred to a third party without Hi-Summit's knowledge. Subsequent to the filing of the D3 Suit, the second respondent ('Lim') became the majority shareholder in Hi-Summit as well as one of its directors. Concerned that Lim, with the might of her shareholding, might discontinue the D3 Suit and thus cause irreparable loss to Hi-Summit, the appellants applied to the High Court under s 181A of the Companies Act 1965 for leave to continue, intervene in or pursue with the D3 Suit. The court refused leave holding that as the appellants were in control of Hi-Summit, they were not the 'genuinely aggrieved minority' who should be granted leave under s 181A. At the hearing of the instant appeal against that decision, the Court of Appeal ('the COA') directed the parties to call a board meeting of Hi-Summit to resolve whether the D3 Suit should be maintained. The appellants informed the COA at the adjourned appeal hearing that no resolution could be taken as Lim did not attend the meeting. The appellants had also not attended an emergency general meeting of shareholders which Lim had called for.

Held, dismissing the appeal:

(1) It was apparent that the parties had not exhausted their internal remedies for various reasons. For the court to be satisfied that it was in the interests

of the company to allow a statutory derivative action to be maintained, the internal processes of the company needed to be satisfied. The court preferred to have a clear resolution of the company on this. Until those processes were completed, the D3 Suit could still proceed. If the majority shareholder decided to discontinue that suit, the appellants could file a fresh application under s 181A (see paras 13–14).

[Bahasa Malaysia summary

Responden pertama ('Hi-Summit'), yang dikendalikan oleh perayu-perayu, telah memulakan tindakan di Mahkamah Tinggi ('Guaman D3') untuk mendapatkan balik ekuitinya 19%, bernilai sebanyak RM323 juta, di dalam syarikat responden ('KLT'). Tindakan tersebut adalah berdasarkan ke atas dakwaan ekuiti tersebut telah dipindahkan secara palsu kepada pihak ketiga tanpa pengetahuan Hi-Summit. Selepas pemfailan Guaman D3 tersebut, responden kedua ('Lim') menjadi pemgang saham majoriti di dalam Hi-Summit dan juga sebagai salah seorang pengarahnya. Takut bahawa Lim, dengan kekuatan pemegangan sahamnya, mungkin menamatkan Guaman D3 dan oleh itu menyebabkan kerugian yang tidak dapat dipulihkan kepada Hi-Summit, perayu-perayu memohon kepada Mahkamah Tinggi di bawah s 181A Akta Syarikat 1965 untuk izin meneruskan, campur tangan dalam atau meneruskan dengan Guaman D3. Mahkamah menolak memberikan izin dengan memutuskan bahawa perayu-perayu yang mengawal Hi-Summit, mereka bukan 'genuinely aggrieved minority' yang patut diberikan izin di bawah s 181A. Semasa pendengaran rayuan ini terhadap keputusan tersebut, Mahkamah Rayuan ('MR') mengarahkan kesemua pihak untuk mengadakan mesyuarat lembaga Hi-Summit bagi menyelesaikan sama ada Guaman D3 patut dikekalkan. Perayu-perayu memberitahu MR semasa pendengaran rayuan yang ditangguhkan bahawa tiada resolusi boleh diambil memandangkan Lim tidak menghadiri mesyuarat tersebut. Perayu-perayu juga tidak menghadiri mesyuarat agung tergempar pemegang-pemegang saham yang mana telah diadakan oleh Lim.

Diputuskan, menolak rayuan:

(1) Adalah jelas pihak-pihak tidak menggunakan remedi dalaman mereka untuk pelbagai alasan. Untuk mahkamah berpuas hati bahawa ia adalah untuk kepentingan syarikat untuk membenarkan tindakan derivatif statutori untuk dikekalkan, proses dalaman syarikat perlu dipenuhi. Mahkamah memilih untuk mempunyai resolusi jelas syarikat atas perkara ini. Sementara menunggu proses tersebut siap, Guaman D3 masih boleh diteruskan. Jika pemegang saham majoriti memutuskan untuk tidak meneruskan tindakan tersebut, perayu-perayu boleh memfailkan permohonan baru di bawah s 181A (lihat perenggan 13–14).]

Notes

For cases on minority shareholder, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 151–152.

Legislation referred to

Companies Act 1965 s 181A, 181B

Su Tiang Joo (Teh Eng Lay, Ong Ing Hou and Faye Lim with him) (Cheah Teh & Su) for the appellants.

David Mathews (Michele Kaur and Nora Azrina with him) (Sun & Michele) for the respondents.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge refused to grant leave to the appellants under s 181B of the Companies Act 1965 to continue, intervene or pursue a suit commenced by the appellants through the first respondent for a claim of its 19% equity in Konsortium Lapangan Terjaya Sdn Bhd ('KLT').

[2] We heard the appeal and after due consideration to respective submissions of counsel, we dismissed the appeal and now give our reasons.

BACKGROUND FACTS

[3] The appellants in 2003 were in control of the first respondent company and had commenced an action in Kuala Lumpur High Court under Civil Suit D3-22–1958 of 2003 ('D3 Suit') to claim for its 19% equity in KLT. The 19% equity is alleged to have a value of RM323m.

[4] The second respondent in or about 2007 entered the picture and started a legal suit to claim ownership of 60% in the first respondent in which the Court of Appeal on 21 March 2011 upheld the aforesaid claim with the Federal Court refusing leave to appeal on 13 August 2012. The upshot of those two decisions is simply that the second respondent is the rightful owner of the 60% shareholding in the first respondent and hence a majority shareholder in the same with the appellants rendered into minority shareholders.

[5] D3 Suit was struck out by Justice Mary Lim on 12 April 2011 on the ground that the appellants had no authority to commence the same premised mainly on the fact that the second respondent had since became the majority shareholder in the first respondent. However, that 'striking out decision' on

appeal to this court was reversed on 20 September 2013 and the D3 Suit was ordered to be reinstated. So for all intents and purposes, the D3 Suit is pending in the Kuala Lumpur High Court. It should also be noted the learned judge in this suit delivered her decision prior to the decision of this court to reinstate the D3 Suit.

[6] In view of the status of the appellants as minority shareholders they contended that for them to maintain the D3 Suit, they were constrained to apply for leave under s 181A of the Companies Act 1965 to continue, intervene or pursue the D3 Suit as the second respondent had displayed her intention to discontinue the same.

THE HIGH COURT DECISION

[7] The learned judge in her grounds discussed the rationale of s 181A of the Companies Act 1965 and concluded after reviewing the relevant cases that the appellants must be persons who are a 'genuinely aggrieved minority' before they can utilise s 181A.

[8] Her views on this were as follows:

> In the present case, the plaintiffs say that they are minority shareholders by virtue of the judgment of the High Court in the suit declaring that the second defendant is the beneficiary owner of 60% shares in Hi-Summit and the decision of the Court of Appeal on 21 March 2011 directing the 60% shares to be transferred to the second defendant.
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> However, the plaintiffs' case is complicated by the fact that they remain in control of the board of directors. The soul of the company is the board. And whoever controls the board controls the company. The plaintiffs are the only directors of Hi-Summit and they are still in control of the board. They even gave the 30 days' notice under s 181B(2) to themselves, all three of them. As such, I am of the considered opinion that since the plaintiffs are still in control of the board, they are not the genuinely aggrieved minority who should be granted leave under s 181A of Act 125.

[9] The learned judge also found that the application of the appellants was nothing but a collateral attack to circumvent the decision of Justice Mary Lim dated 12 April 2011 in striking out the D3 Suit. That decision as mentioned earlier was reversed by this court on 20 September 2013.

[10] Premised on the above two grounds and a finding of lack of good faith on the part of the appellants, the learned judge dismissed the appellants' application under s 181A of the Companies Act 1965.

A SUBMISSION OF THE APPELLANTS

[11] The submission of the appellants reads as follows:

We humbly submit that the Appellants have satisfied all the legal requirements for leave to be granted:-

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8.1 *The Appellants are 'complainants' under S181A* — each and every one of the Appellants are 'a member of a company, or a person who is entitled to be registered as member of a company' as well as a 'director of a company'.

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8.2 *The 30 days' notice requirement is satisfied* — the Appellants have given the requisite notice to the board of Hi-Summit.

8.3 *The Appellants are acting in good faith and it appears prima facie in the best interest of Hi-Summit that the application for leave be granted* — the Appellants are undoubtedly acting in good faith and in the best interest of Hi-Summit as they are seeking leave of this Honourable Court to proceed with a claim to recover Hi-Summit's only and extremely valuable asset. If leave is not granted, the only outcome would be that the 2nd Respondent, through the might of her shareholding, will discontinue the D3 Suit causing Hi-Summit to suffer irreparable loss of the 19% equity.

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9. Further, leave should also be granted on the following reasons:-

9.1 The D3 Suit is a *legitimate and arguable claim* as Hi-Summit's original 19% equity in KLT was somehow fraudulently transferred to Ulimas Sdn Bhd.

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9.2 No evidence and particulars of any consideration for the transfer has been produced. In fact, this Honourable Court had agreed previously that the D3 Suit was legitimate and arguable when it reinstated the same on 9-6-2008 after it was first struck out by the High Court on 27-4-2005.

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9.3 Further, the D3 Suit is a claim for the 19% equity worth approximately RM323 million. This will result in a substantial gain in money or money's worth for Hi-Summit and should be pursued.

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10. With the 2nd Respondent evincing the clear intention to have the D3 Suit discontinued, leave should be granted as a pre-emptive measure to prevent any irrecoverable loss to Hi Summit.

(Emphasis added.)

I OUR GROUNDS OF DECISION

[12] At start of the hearing of this appeal on 24 February 2014 we were informed of the earlier mentioned fact that the D3 Suit had since been reinstated by this court, hence, the claim against KLT for the 19% shares is

pending in the High Court. We also noted that the second respondent has now been registered as a 60% shareholder in the first respondent. There is also no dispute that the appellants remain in control of the board of directors.

[13] Premised on those facts, we directed that parties call for a board meeting to resolve whether to continue with the D3 Suit and accordingly granted a short adjournment to parties to effect our intentions. On the subsequent hearing date on 10 March 2014, we were informed that the parties have not been successful in having this meeting. According to the appellants they had called for the meeting but the second respondent chose not to attend. There appears to be some issue on the appointment of her nominees to the board of directors in the face of objections from the appellants. The second respondent herself had called for an emergency general meeting of the shareholders but the appellants did not attend this meeting. It was thus apparent to us that parties had not exhausted their internal remedies for various reasons, one of which is the hospitalisation of the second appellant.

[14] It is our respective view that for this court to be satisfied that it is in the interest of the company to allow a statutory derivative action to be maintained, the internal processes of the company need to be satisfied. We prefer to have a clear resolution of the company on this. And until those processes are completed, the D3 Suit can still proceed. If the majority shareholders shall decide to discontinue the suit, we find that the present appellants are fully entitled to file a fresh application under s 181A.

CONCLUSION

[15] For reasons stated above, we dismissed the appeal with no order as to costs since the appellants' application was made to protect the interests of the company. Accordingly we also set aside the orders of the High Court in respect of costs and ordered that the deposit to be refunded to the appellants.

Appeal dismissed.

Reported by Ashok Kumar